Supreme Court, U.S.
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No. 01-1184

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

FRANCISCO JIMENEZ RECIO and
ADRIAN LOPEZ-MEZA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Thomas A. Sullivan, C.J.A. Counsel on behalf of respondent Adrian Lopez-Meza, respectfully files this opposition to the United States of America's Petition for Writ of Certiorari.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 258 F.3d 1069, and is appended to the Petition for Certiorari.

STATEMENT

On the date in question, November 18, 1997 at 1:18 a.m., police arrested two men (Sotello and Arce) who were riding in a truck near Las Vegas, Nevada, which contained marijuana and cocaine. With Arce's cooperation, agents came up with a plan to transport the truck to Nampa, Idaho, and leave it at a location which Arce initially claimed was the

destination. The truck and its load spent all day, November 19, 1997, under surveillance in Nampa, and finally, after several calls were made between Arce and unknown persons in which Arce explained where the truck was parked, Lopez and Recio appeared and Recio drove the truck away while Lopez followed in a car, almost 48 hours after the load was seized.

Lopez was charged with conspiracy to possess a controlled substance with intent to distribute and with actual possession of a controlled substance with intent to distribute. The indictment is at Appendix D of the Petition for Writ of Certiorari. Lopez was convicted at trial and filed a Motion for Judgment of Acquittal, arguing that the specific conspiracy plead in the indictment charged that Lopez joined the conspiracy prior to November 18, 1997, and that under United States v. Cruz, 127 F.3d 791 (9th Cir. 1997), the government was required to prove this fact and that they did not.

The District Court converted that motion to a Motion for New Trial and granted the same. The United States filed a Motion to Reconsider Grant of New Trial. (See Appendix B to this Brief). In that motion, the government took the following position:

> The United States does not dispute the basic and general conspiracy law upon which the Court has made its decision, namely, that a conspiracy is deemed to continue 'until there is affirmative evidence of abandonment, withdrawal, disavowal or defeat of the object of the conspiracy.' United States v. Castro, 972 F.2d 1007, 112 (9th Cir. 1992). However, the United States does take exception to the specific application of the case of United States v. Cruz, 127 F.3d 791 (9th Cir. 1997). That case is simply not applicable, but has been directly relied upon by the Court in focusing on the defeat of the object of the conspiracy as the

pivotal issue in deciding these post-conviction motions. **At the same time, the United States agrees with the essential formulation of the primary issue, namely, whether "a rational trier of fact [could] find that Lopez and Jiminez were members of the conspiracy prior to the seizure of the drugs in Nevada at 1:18 a.m. on November 18.'** (Memorandum Decision and Order, page 4.)

The anatomy of the Cruz case can be stated in three component parts. First, that conspiracy was limited by the indictment and the evidence to five named individuals. Second and similarly, that conspiracy was limited by the indictment and the evidence to the single load of narcotics transported from California to Guam. Third, the Defendant Cruz was indisputably not involved prior the seizure of the drugs, but was recruited afterwards. Those post-seizure activities, though perhaps constituting a conspiracy, would necessarily have constituted a new conspiracy not charged in the indictment, all by virtue of the defeat of the limited object of the conspiracy with the seizure of the narcotics.

The composition of the case at bar is distinct.

First, the conspiracy charged in the Superseding Indictment is much broader and not limited to the four named Defendants.

***

In short, though the November 18 load served as an evidentiary springboard at trial,

the Superseding Indictment and the trial evidence proved a conspiracy broader than and whose overall object exceeded that single load.

Thirdly, and unlike Cruz, the evidence was substantial that Defendants Jiminez and Lopez were involved in the conspiracy prior to the November 18 seizure in Nevada. The Court acknowledges this in finding, as a matter of law, that the evidence was 'sufficient to support a jury's finding, beyond a reasonable doubt, that Jiminez and Lopez were members of the conspiracy, and that their membership in the conspiracy predated the seizure of drugs.' (Memorandum Decision and Order, page 5.) Thus, there is no need to consider whether or not Jiminez and Lopez were members of new conspiracy subsequent to the seizure of the drugs. **Unlike Cruz, they were clearly members prior to that seizure.** [Emphasis Added]

Upon re-trial, the government dismissed the charge of possession with intent to distribute as to Lopez, proceeding only on the conspiracy charge. The District Court adopted the United States' argument, set forth above, into its jury instruction, Instruction No. 24, which stated:

> A defendant may only be found guilty of the conspiracy charged in the indictment if he joined the conspiracy at a time when it was possible to achieve the objective of that conspiracy.
>
> Therefore, if you find that a conspiracy existed, the sole object of which was the possession with intent to deliver and/or

> delivery of the controlled substance seized by authorities in Las Vegas, Nevada, on November 18, 1997, a defendant may be found guilty of that conspiracy if you find beyond a reasonable doubt that that defendant joined or became a member of the conspiracy prior to 1:18 a.m. on November 18, 1997.
>
> On the other hand, if you find beyond a reasonable doubt that a conspiracy existed, the object of which was the possession with intent to deliver and/or the delivery of controlled substances beyond those seized by authorities in Las Vegas, Nevada, on November 18, 1997, a defendant may be found guilty of that larger conspiracy only if you find beyond a reasonable doubt that the defendant joined the conspiracy, whether before or after November 18, 1997, and that he knew or had reason to know of the scope of the larger conspiracy and embraced its objective.

At the jury instruction conference, the United States voiced no objection to Instruction No. 24 in regards to the two alternative conspiracy theories it contained or the elements thereof. (Appendix D).

The jury convicted Lopez of conspiracy, without specifying which theory was adopted.

On appeal, the Ninth Circuit Court of Appeals held that the evidence presented by the United States was insufficient to convict Lopez of either of the two theories of conspiracy set forth in Instruction No. 24. On appeal, the United States argued that a reasonable inference from known facts demonstrated that Lopez was involved "well before the seizure" of the drugs, because his "post-seizure behavior not only corroborated his pre-seizure activity . . . but, in and of itself, suggested prior involvement" and "[m]oreover, those

same facts show a pre-existing conspiracy that involved much more than the single load as evidenced by the quantity of narcotics involved, the organization, communication patterns and structured activities." (Appendix F). The Court of Appeals was not convinced with the United States' proof:

> The district court held, and the government argues, that there was some evidence tying Lopez-Meza and Jimenez Recio to the conspiracy before the drugs were initially seized. The district court stated that "Lopez's and [Recio's] words and conduct, upon their picking up the truck in Nampa and subsequently being stopped by the authorities, provided a probative link between themselves and the specific conspiracy charge." Further, before the initial seizure, both Jiminez Recio and Lopez-Meza allegedly called the same telephone number in Idaho and different numbers in Chicago using pre-paid calling cards.
>
> This is insufficient evidence of guilt. Nothing Defendants said or did on November 18, 1998 directly links them to the pre-seizure conspiracy. That Jiminez Recio and Lopez-Meza lied to officers upon arrest points only to knowledge that they were involved in illicit activity at that time and provides no basis for concluding that they were involved in the conspiracy beforehand. There is also no proof that Jimenez Recio and Lopez-Meza used the pre-paid calling cards; anyone could have used them by dialing the pin number code. In fact, it is clear that at least two of the calls upon Lopez-Meza's card were made by someone else. The government produced no evidence identifying the participants in or the contents of the conversations . . . .
>
> * * *
>
> On the other hand, there is strong evidence that Lopez-Meza and Jimenez Recio were not involved in the pre-seizure conspiracy. The government's main witness, Arce, had never met either Lopez-Meza or Jimenez Recio before the drugs were seized. Once the police decided to continue

> the drug operation, Arce called an Arizona pager number to arrange for a drop-off, but neither Lopez-Meza nor Jimenez Recio were among the three callers who responded to the page. One of the callers returning the page stated that he would send a "muchacho" ("boy" in Spanish) to get the truck, suggesting that Defendants were simply drivers hired at the last minute. Furthermore, the initial conspiracy did not envision a drop-off in the Karcher Mall parking lot where Lopez-Meza and Jiminez Recio retrieved the truck–the police initiated the arrangement to meet there as part of their post-seizure "sting" operation. Indeed, Arce and the government's own expert testified that Arce and Sotello, the original driver, would have driven the drug truck to the Nu Acres "stash house" themselves had they not been stopped and arrested. Taken as a whole, the evidence was insufficient for a rational jury to conclude beyond a reasonable doubt that Defendant's were involved in the conspiracy to deliver the drugs prior to the initial seizure of the truck.
>
> The government also relied on an additional broader conspiracy theory to circumvent Cruz on retrial, providing detailed expert testimony demonstrating that the drug shipment bore the hallmarks of a complex and sophisticated operation that likely involved more than one shipment. However, the limited role Defendants played in the November 18 shipment alone is insufficient to charge them with complicity for any prior loads. Cf. United States v. Umagat, 998 F.2d 770, 773-774 (9th Cir. 1993)(minor role of defendants in single transaction does not permit imputed liability for the broader conspiracy). Therefore, this theory too hinges on proof of prior involvement . . . .
>
> Ultimately, however, we remain unpersuaded . . . .
>
> As for Lopez-Meza's multiple links to his uncle Jose Meza (a.k.a. "Raul") and to Nu Acres, the "stash house" where both Lopez-Meza and Jose Meza apparently lived at times, these are hardly probative of nefarious activity. Much of the

dissent's reasoning from these facts amounts to guilt-by-association. If Lopez-Meza indeed lived at Nu Acres, so did many other immigrants. His presence on the scene and familial ties to Jose Meza just as readily support the theory that he was simply a convenient substitute recruited at the last minute.

The United States now petitions for a Writ of Certiorari, objecting to the influence that United States v. Cruz had on the prior proceedings. Again, neither in District Court nor in the Ninth Circuit Court of Appeals on direct appeal to the panel who issued the decision, did the United States take the position that Cruz should be overturned.

REASONS FOR DENYING THE PETITION

The history and prior proceedings of this case clearly show that the Ninth Circuit Court of Appeals simply made a determination that the evidence presented was insufficient to sustain a conviction for conspiracy, as charged and instructed to the jury. Petitioner chose the language and manner of the indictment's charge, and voiced no objection to the manner in which the District Court instructed the jury on that charge.

Petitioner asserts that this case squarely presents the legal issue of the viability of the ruling of law in United States v. Cruz, 127 F.3d 791 (1997), cert. denied, 522 U.S. 1097 (1998). This is not so.

As set forth above, although Cruz was relied upon by the trial court in formulating a jury instruction and by the Ninth Circuit Court of Appeals, Plaintiff/Petitioner United States of America did not ever challenge the viability of the Cruz decision in District Court or on direct appeal before the Ninth Circuit panel. Rather, Petitioner always took the position that the United States could and did convict Lopez by proving that Lopez joined the conspiracy on or before November 18, 1997, which was the date of the seizure of the

load of drugs and which was the manner that the conspiracy was plead in the indictment: "From on or about a date uncertain, **but by November 18, 1997**, within the District of Idaho, Manuel Sotelo, Ramiro Arce, Francisco Jiminez and Adrian Lopez, defendants herein, did knowingly, intentionally, and unlawfully conspire, confederate and agree with others, both known and unknown to the Grand Jury to commit an offense . . . to possess with intent to distribute and/or distribute cocaine . . and/or marijuana." Importantly, Lopez' physical involvement with the load was nearly 48 hours after the November 18, 1997, 1:18 a.m. seizure. The United States argued to the jury that their proof showed that Lopez became a conspirator before November 18:

> And then on the 14th [of November, 1997] we see the entry of another individual. We see the entry of Mr. Lopez, another one of the defendants, as he is using his calling card contacting an individual or individuals at New Acres. In and of itself, an innocuous event, but when we realize the significance of the New Acres number, when we realize the significance of Mr. Lopez' activities, when we realize the significance of the subsequent events involving his calling card, we realize that now Mr. Lopez, by virtue of the phone tolls we see, that he is starting to participate in the preparation for the load being brought back from the Phoenix area.

March 20, 1998 Tr. p. 1019; Appendix A.

> What's happening on the 15th in the meantime? . . . Mr. Lopez is calling Chicago, the same numbers that Mr. Sotelo is calling, once again talking to the Chicago connection--now that Mr. Sotello is going down to pick up the narcotics—to make sure that there is the communication telling each other they're

going down to get it. It will be coming back soon.

March 20, 1998 Tr. pp. 1023-1024; Appendix A.

And if you'll look here on 11-17, the first entry we have is Mr. Lopez—of course, not on this trip. He's back in the Nampa-Caldwell hub area calling Chicago. Why is he calling Chicago? They're waiting for the load to come back. Today's the day it's going to be coming back.

And then at 12:17 Mr. Lopez is calling New Acres. Again there's the New Acres connection, the loads coming today.

March 20, 1998 Tr. p. 1029.

In some conspiracy trials, that's not the case, but in this one it is. Why? It's because on November 18 at 1:18 in the morning, the narcotics . . . was seized by the authorities there. If the scope of the conspiracy was just that one load, then it ended there . . . if it ended there, then the conspirators . . . had to have been involved before it was seized . . . .

January 15, 1999 Tr. pp. 762 - 763; Appendix E

From pp. 780 - 784 of Appendix E, the Prosecutor's closing argument focuses upon the ultimate theory of the case: That Lopez joined the conspiracy long before November 18 (just as plead in the indictment) and the conspiracy was greater than one load, negating the importance of the date of joinder.

Upon re-trial, District Court gave a jury instruction

which would allow the jury to convict Lopez if it were proven that Lopez joined a single-load conspiracy prior to September 18, 1997 at 1:18 a.m. (the time of seizure), or if the government proved that Lopez joined a greater conspiracy which involved more drugs than the single load, regardless of whether Lopez joined before or after November 18, 1997 at 1:18 a.m. This jury instruction, Appendix D, met with the government's approval and they argued for conviction under both of those alternatives. The government never argued, or preserved for review, the concept that it was prevented from arguing the proper theory of conspiracy. Again, in District Court Petitioner stated "[T]he United States does not dispute the basic and general conspiracy law upon which the Court has made its decision, namely, that a conspiracy is deemed to continue "until there is affirmative evidence of abandonment, withdrawal, disavowal or defeat of the object of the conspiracy" and "the United States **agrees with the essential formulation of the primary issue, namely, whether "a rational trier of fact [could] find that Lopez and Jiminez were members of the conspiracy prior to the seizure of the drugs in Nevada at 1:18 a.m. on November 18.**" (Appendix B) The United States strenuously argued that "the evidence was substantial that Defendants Jiminez and Lopez were involved in the conspiracy prior to" November 18. (Appendix B)

In the Ninth Circuit, the government again argued that the facts they proved supported a conviction under either or both of the alternatives. (Appendix F). The government never argued that the instruction, which was based on Cruz, was erroneous.

The holding of the Ninth Circuit Court of Appeals is that there was insufficient evidence to convict Lopez or Recio of joining the conspiracy prior to November 18, 1997, the date plead in the indictment and presented to the jury without objection, and that there was insufficient evidence to support a conspiracy that extended beyond the scope of the load that was seized.

Therefore, the Petitioner is asking this court to grant certiorari on a case where the United States was allowed to argue its theory of the case to the jury, given in the form of jury instructions to which the government did not object, which were entirely compatible with the charging language of the indictment, and where the Ninth Circuit Court of Appeals found that there was insufficient evidence.

The Petitioner is trying to create a disputed legal issue where there was none below. The Petitioner is asking this Court to grant certiorari on a case whose holding is limited to the sufficiency of evidence to support a conviction as charged.

Several aspects of this case and Cruz are quite pivotal to a proper understanding of why the Ninth Circuit opinion in this case in no way undermines the capacity of the United States to bring wrongdoers to justice. In Cruz, the Court of Appeals specifically limited its holding to the facts of the case before it and the specific conspiracy charged by the government. "Cruz may well have been a member of some other conspiracy, but it was not the conspiracy charged in the indictment . . . However, it was factually impossible for Cruz to have been a member of that conspiracy because Balajadia and Taitano had been arrested and drugs seized before he was even invited to join [and thus] at most, Cruz may have been a member of a new conspiracy between himself, Mesa and Tenorio [but] that conspiracy was not charged in the indictment." 127 F.3d at 795, n. 4. In this sense, Cruz is simply an extension of the law of multiple conspiracies, as instructed in this case in Instruction No. 23 in Appendix C. "[I]f you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy".

In Cruz, although the Court of Appeals held that the facts did not support a conviction for the conspiracy charged, the Court did find that the facts supported a conviction of Cruz for a different offense, attempted possession of a controlled

substance, 127 F.3d at 797, and the court upheld that conviction. Nothing in Cruz prevents the government from pursuing similar charges against Lopez-Meza for possession or attempted possession of a controlled substance, or embarking upon a conspiracy after the load was placed for pick up at Karcher Mall. There is no crisis of law here. It is a simple matter of the prosecuting attorney selecting and pleading a charge that is supported by the facts and then proving that charge beyond a reasonable doubt.

CONCLUSION

The Petition for a Writ of Certiorari should be denied. It does not meet the criterion of Rule 10. The holding of the Ninth Circuit is limited to a review of the sufficiency of the evidence to support a conviction for the specific conspiracy charged in this case, reflected by a jury instruction based on the United States' pleadings and argument and to which no objection was lodged by the petitioner.

Respectfully submitted,

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APPENDIX A

Government's Motion to Reconsider Grant of New Trial, filed August 7, 1998, Tr. Pp. 1-8

CLOSING ARGUMENT

MR. LINDQUIST: Your Honor. Agent Hinton, Mr. Chavez, Mr. Ratliff, Mr. Sullivan, ladies and gentlemen of the jury. Before I begin, Mr. Fica, would you distribute those among the members of the jury?

Ladies and gentlemen, I'm asking that Exhibit 64 once again be distributed to you so that I might utilize it as an aid in these closing remarks.

First, a couple of preliminary remarks. Your presence here is greatly appreciated and necessary. I hope you realize that. I hope you realize that your time has not been ill spent, regardless of the verdict. Regardless of the outcome, we're here seeking the truth, and you play such a vital role in that.

We're all mindful of the sacrifice that you have made, and it's greatly appreciated that you have made those sacrifices. Secondly, my purpose in addressing you now is not to patronize you. I fully recognize that each of you is just as bright as I, and that collectively you are 13 times brighter than I.

I also recognize that you are 13 times more able to remember the facts than I. However, because we've spent a week, because there are some substantial number of facts, and because I have a responsibility in representing the People of the United States, I want to impose on you just for a little longer to allow me to summarize for you what I say that we have heard and seen over the course of this week.

It has all been presented within the context of the law, a segment of the law, the law of conspiracy and the law of possession with intent to distribute. In spite of, sometimes, our tendency as lawyers to complicate the law, it really is quite simple and straightforward. Conspiracy, as His Honor has instructed you, is an agreement. It's an endeavor between or among a number of people to do something illegal – in this case to transport, possess with intent to distribute cocaine

and/or marijuana. That's the law of conspiracy.

And the second charge is in addition to it. The actual possession of those substances with the intent to distribute is a second offense. And what again is the distinction? I mentioned that in my opening statement to you. Knowing that the endeavor exists and entering into it. Knowing that that endeavor exists is enough to constitute the violation of conspiracy without more. That's conspiracy law.

If, in the course of realizing that conspiracy, there is an actual transport, there is an actual possession of a narcotic with the intent to distribute, then the second violation has occurred. That's the law. That is the context within which all of the information had been presented to you.

Now, as to that information, would you take a look at this Exhibit No. 64? You know that it begins on November 12 as far as its date, but you also know that the testimony began on November 18 with the stop of the vehicle in Nevada by Trooper Owens and by Officer McIlroy.

Though the testimony, though the evidence started on the 18th, you now know that the conspiracy was well in progress long before that truck was stopped near Las Vegas. And I'd like you to recall something that Trooper Owens said that really explains the significance of the events portrayed in this document as of November 12.

Remember what he said? He said, "I recognized the significance of this vehicle ultimately after stopping it," after talking about the reasons that he stopped it. Ultimately he started asking those questions – "Do you have something in this vehicle? May I search this vehicle?" – because he saw something by virtue of his training. He knew something by virtue of his training. And what did he tell you?

He knew that this vehicle, by a statement made by Mr. Sotelo and Mr. Arce, was coming from Phoenix, a narcotics origin or source city, and that it was traveling north to the

Nampa—Caldwell area, what he referred to as a hub area, an area from which narcotics are further transported and distributed around this part of the country.

Now, compare that statement with what you're seeing here on this particular document. As of the 12th, three days before Mr. Arce and Mr. Sotelo left the Nampa—Caldwell area to go down to Arizona – Mexico ultimately – to bring the load of narcotics back, what was happening?

Mr. Sotelo was contacting individuals or an individual in Chicago. The Chicago connection. The transport, the finance. This conspiracy involves Chicago, and Mr. Sotelo as of the 12th is already contacting those individuals with regard to the fact that what? That he will shortly be going south to Mexico and Phoenix in order to pick up a load of narcotics. How do we know that? Because we know that these same numbers are called later on in direct relation to the events of picking up the truck, though later, and we'll talk a little bit more about that in just a moment.

That's what took place on the 12th. Mr. Sotelo was already making the arrangements. He's already – we're already seeing that what Officer Roselle Owens ultimately saw is true. This was happening. From Nampa—Caldwell, Chicago was being contacted. That area as
a hub is being demonstrated by these telephone calls. It continued on the 13th as Mr. Sotelo made three more calls to Chicago, as the circumstances in the arrangements became more concrete and more finalized, and once again anticipating his traveling down to Mexico and Phoenix in order to pick up the narcotics.

And we also see another telephone call on the 13th which further substantiates those preparations. He contacts Roberto Ybarra, one of the individuals that ultimately he physically personally makes contact with on the way down and on the way back in conjunction with picking up the narcotics. What's happening here?

Arrangements are being made already. Arrangements are being made already. And then on the 14th we see the entry of another individual. We see the entry of Mr. Lopez, another one of the defendants, as he is using his calling card contacting an individual or individuals at New Acres. In and of itself, an innocuous event, but when we realize the significance of the New Acres number, when we re[illegible]ze the significance of Mr. Lopez's activities, when we re[illegible]ze the significance of the subs[illegible]t events involving his calling card, we realize that now M[illegible]opez, by virtue of the phone tolls we see, that he is starting to participate in the preparation for the load being brought back from the Phoenix area.

At this particular time on the 14th and the evening of the 14th, Mr. Arce enters the picture. You remember the testimony of Mr. Arce? He told you that he had known Mr. Sotelo for a period of time; that by virtue of activities between them he owed Mr. Sotelo some money, and on this evening Mr. Sotelo came to him, asked him to do a number of things. He asked him to come over to his house to take a young lady home, which he did. Why did Mr. Arce tell you that? So that you could see that he was telling you the details of what truly happened. Did it make sense? It made sense.

He told you that later on he was asked to meet Mr. Sotelo to help get at vehicle started. The cables were already there. He went and did that. Why did he give you that detail? So that you could see in your mind's eye that these events were really happening. Mr. Arce isn't making this up. This really happened. He went and did that. And then he came back. And remember one little detail that he said when he went to pick the girl up to take her home, that Mr. Sotelo told him that he was expecting an important telephone call and he didn't want anyone else to hear it.

What kind of telephone call? This kind of telephone call, the telephone calls that were being made in order to arrange for this load of narcotics to come up. Now, Mr. Arce was already, albeit unwittingly at that time, participating in

that as he took the young lady home.

They got the vehicle started, and Mr. Arce came back to his house. As he was going into his house. Mr. Sotelo drives up and proposes to him that he go with him to Arizona. Now, it was more than a proposal that he go with him. He essentially told Mr. Arce that he had to go with him; that if he did he would forgive the debt that he owed him, but that if he did not, he would take his car, Mr. Arce's car.

In conjunction with that discussion, it was made clear that Mr. Sotelo was going down to get narcotics. Mr. Arce knew that, but he was between the proverbial rock and the hard place. If he didn't go down he was going to lose his car, and I think you sensed the earnest attitude of Mr. Arce, his belief that he was going to truly lose his car by virtue of that debt if he didn't participate.

And he participated. He agreed to do it in order to foreclose – in order to prevent the loss of his car. Mr. Sotelo went away. Mr. Arce was there at his home for a while. A short time later Mr. Sotelo comes back and picks him up. In the meantime, Mr. Arce has put together a few clothes, puts it in a plastic grocery sack, and they leave.

Now, prior to that time Mr. Arce's understanding is that they're going to take a blue truck down, but as they go over to a house where they're picking up the vehicles, Mr. Sotelo's house, the blue truck isn't there. The information to Mr. Arce is that the blue truck has already gone down, but the white truck is there, the same white truck that ultimately they are arrested in.

You heard about the luggage. You heard him telling you about how they took the luggage, the four pieces, and put it into the truck and they headed down. That's all happening there on the evening – on the evening of the 14th and going into the early morning hours of the 15th.

What did he tell you that happened? He told you that they traveled down through Jackpot and they stayed in Jackpot for a while and gambled, and that from there they proceeded on after a few hours toward Phoenix.

What's happening on the 15th in the meantime? Now enters another individual, as portrayed by the phone records, that starts to participate in the conspiracy. Mr. Jiminez is now involved calling New Acres. What's happening? Now, the individuals involved know that Mr. Sotelo is on his way down to pick up the load, and they're starting to talk in order to formalize and make sure that the arrangements were made, including Mr. Jiminez.

Once again, this entry would be innocuous, perhaps insignificant, in and of itself were it not for the subsequent events involving Mr. Jiminez, involving his pager, involving his calling card. But you see here, by virtue of what other people are doing, Mr. Jiminez and others are already starting to communicate. All right.

They're going down to get the load. It will be coming back soon. That same day Mr. Sotelo – well the next entry, we see something that's very interesting. During the course of the trial you've heard about the term "corroboration." Mr. Arce said that they were going from Las Vegas down toward Phoenix in that area after they'd traveled a significant period of time. Mr. Sotelo called his girlfriend in Vale, Oregon. You heard that girlfriend testify, and she said that she was in Vale, Oregon, and there is the phone toll indicating that that call was made.

At the same time or shortly thereafter, Mr. Lopez is calling Chicago, the same numbers that Mr. Sotelo is calling, once again talking to the Chicago connection -now that Mr. Sotelo is going down to pick up the narcotics – to make sure that there is the communication telling each other they're going down to get it. It will be coming back soon.

And then we see toward the bottom of page one, we see a number of telephone calls to Roberto Ybarra, to Ramon Perez. That's totally consistent with two things. It's totally consistent with what Mr. Arce told us as far as what was happening as they traveled down, as Mr. Sotelo was communicating with other individuals involved in this endeavor – Roberto Ybarra and Mr. Ramon Perez.

It also shows that other people are indeed involved. In other words, Mr. Sotelo was telling them, "I'm coming down. We're bringing the truck down. Be ready to receive us. This is the truck that you're going to put the narcotics in. Get ready. Get ready for us. We're coming down so that we can leave the truck. We'll go about our business. We'll come back and pick it up."

And the phone calls established both of those things. Turn over to the next page. There we see more phone calls to Ramon Perez, to Roberto Ybarra. Three calls to Roberto Ybarra, one more to Ramon Perez, again substantiating what Mr. Arce told us about Mr. Sotelo making phone calls on the way down, and also establishing the fact that the endeavor is becoming even more firmed up as far as getting ready for the truck to come down.

They arrive, according to Mr. Arce, there in the evening. What does he tell us? That they arrive in Phoenix pursuant for these phone calls; that Ramon Perez is supposed to meet them at a particular exit by a particular store. They go to that store. Mr. Sotelo tells Mr. Arce to park that truck in a handicapped parking spot. Do you remember that testimony? Why did had Mr. Arce tell you that? Once again, to show you the detail, his recollection of what was actually happening.

He told you that he resisted that. It's a handicapped parking spot, and Mr. Sotelo got a little bit firm with him, upset, and said, "Park it there. Do what you're told to do." And so the white truck was parked there. Who was waiting for them? Ramon Perez. Ramon Perez picks them up in the

white Cadillac.

What's happening here? The truck that's going to be filled with dope in Phoenix, the source city, according to Roselle Owens, is now being left so that that can happen, and members of the conspiracy are together.

Ramon Perez takes them back to the house. How we do know that Ramon Perez is a member of the conspiracy? First of all, he picks them up there. He's receiving telephone calls from Mr. Sotelo on the way down. He's there waiting for them. He's aware of the truck. He's aware of what's going on. And as they drive over there over to the house of – not Ramon's house but Roberto Ybarra's house, what do we hear about? We hear about firearms, we see a .45 brought out and a discussion about .45s and .357s.

And when they finally get to the house what does Mr. Sotelo pull out of his bag but a machine gun with a silencer, and they talk about those things. And you see that that's consistent with what's happening here. A truck has been left to be filled with a substantial amount of cocaine and marijuana, and the people involved doing it are talking about firearms and machine guns. They have those weapons with them, totally consistent with the testimony that you've heard that firearms frequently do go with drugs, particularly in these amounts.

Shortly thereafter, they're there at Mr. Ybarra's house, what do they find? The blue truck, the same blue truck that Mr. Arce told us about, and interestingly enough, one of the witnesses that testified under direct examination, Juan Barroso, he talked about a '62 Impala and a blue truck being taken down.

What did Mr. Arce say he saw there behind the house but the blue truck and the '62 Impala. Mr. Arce is telling us the truth. It's been corroborated as he goes along. They transfer the luggage. They get into the -they get into that blue truck and they head to Mexico. All of this is happening. Of

course, we have to read between the lines.

There on the evening of the 16th and then as we go into the 16th, what do we see? We see a whole series of telephone calls. First of all, we see that Mr. Lopez is making a telephone call at 12:45 to Chicago. Why are we getting a call made to Chicago? It's one of those daily calls that Mr. Lopez is making to Chicago because the truck had been delivered. It's being loaded. It's going to be on its way back shortly, and they're reporting to that connection.

Then we see a whole – then we see four calls here from Mr. Sotelo to the pager. This is compadre. This is the person that's responsible for getting the truck full of dope. Now that Mr. Sotelo has left the truck there in Phoenix to be filled with dope by compadre, he's talking to compadre as they go down, making sure it's taken care of, making sure it's done right because he's got an errand to do in Mexico, totally consistent with what Mr. Arce told us as they traveled down.

What does Mr. Arce tell us? That they arrived at the border at 3:30. So right after the 1:51 a.m. call, they're arriving at the border a couple of hours later, 3:30. They go across the border. They go to a motel, and who do they find there but what is reported to Mr. Arce as the wife of Mr. Sotelo, Norma.

The two of them, Mr. Sotelo and his wife spend the night in the motel. Mr. Arce sleeps in the car. What does he tell us. He said he woke up about 10:30. He went up to the motel room, knocked on the door, and nobody was there. That was the morning of the 16th. So he went back to the car. He waited. He fell asleep, goes back to the motel room at three o'clock, knocks on the door, still no one there.

Mr. Sotelo and Norma had left to go someplace, do something. We don't know. He goes back to the truck, comes back at six o'clock, knocks, and no one's there. Finally, he just goes back to the truck, figures -just resigns himself to the fact that he's going to have to spend the night, and he spends the evening of the 16th there until the following morning.

Norma's knocking on the door saying, "Wake up." He goes up to the motel room. They give him something to eat because he hadn't eaten for a substantial period of time. They allow him to shower. And then what do they do? They head to Hermosillo all together in the blue pickup truck. What happens in Hermosillo? Why am I telling you all this?

Mr. Arce is relating these details to you. Does it make sense to you that this is just all fabricated, or is this truth in his mind? It makes sense, and it seems to be corroborated by the corollary facts that we have here. They go to Hermosillo. They stop by an aunt's place, a relative of Mr. Sotelo, ten minutes. Then they go to the center of town. They leave the blue truck.

They stop there, and they're eating, and Mr. Sotelo and Norma leave in the blue truck and then Mr. Sotelo comes back alone. We don't see Norma again. Mr. Sotelo comes back alone on foot. They take a taxi to the bus station. They buy a ticket. Mr. Arce buys tickets, given the money by Mr. Sotelo. They take the bus up to Nogales.

They cross the border on foot. They get a bus there, and they're heading across, and this is all happening, you see, between the last entry of 11-16 and 11-17. Mr. Arce tells us that they got – the moment that they crossed the border, about 15 minutes, as they were in the taxi going from the border back to Phoenix.

Why were they going back to Phoenix? To pick up the truck loaded with the dope. Fifteen minutes in route. Mr. Sotelo is on the telephone talking to Compadre, and if you'll look here on 11-17, the first entry we have is Mr. Lopez – of course, not on this trip. He's back in the Nampa-Caldwell hub area calling Chicago. Why is he calling Chicago? They're waiting for the load to come back. Today's the day it's going to be coming back.

And then at 12:17 Mr. Lopez is calling New Acres. Again there's the New Acres connection, the load's coming

today. It's going to be coming today. Let's be ready, and Mr. Jiminez is calling New Acres. Load's coming. Let's be ready today. Is that in and of itself significant? No. But later on we see Mr. Lopez and Mr. Jiminez showing up to pick up the load. And then look at 12:44.

Mr. Arce tells us that they got to the border, they left the border at about 12:30, and he said at 12:15 Mr. Sotelo was making the call to that pager number talking to Compadre, and there it is. Mr. Sotelo is talking to the Arizona pager, who is Compadre, and now we have the series of telephone calls with Compadre, Roberto Ybarra, Ramon as they go up to Phoenix to pick up the truck that's now being loaded or had been loaded with dope.

We see an entry there on the next page of 5:47 p.m. What's so significant about that entry? A phone call to Juan Manuel Gutierrez. Mr. Arce said that when they arrived at Casa Grande, Mr. Sotelo had the taxi driver take them to Casa Grande. They got to Ramon's house, and he wasn't there, and they couldn't find him, so they walked up the street to whose house? Juan Manuel's house.

This telephone call by Mr. Sotelo seems to corroborate what Mr. Arce is telling us as far as that is concerned and then we see more phone calls here to the Arizona pager to Compadre. What for? Once again making sure that the truck is ready. And what did Mr. Arce say was the gist of these conversations? "Is the truck ready? Is it ready to go?" Are we just talking about repairing the brakes? Are we just talking about repairing lights, some mechanical thing? No. The truck is being filled with dope, and Mr. Sotelo was making sure that the truck is ready. He wants to leave right away to take it back. The last entry is at 7:38.

Mr. Arce tells us that they arrived in Phoenix in the evening, got the truck and headed out as Ramon Perez had taken them to Phoenix. Is it coincidence that Ramon Perez is taking them to Phoenix to pick up this truck? No, it's not coincidental. Ramon Perez is part of this endeavor, so they go

to Phoenix. They're at Exit 51. They pick up the truck and they head out. They go to Las Vegas and they're stopped in Las Vegas. They're stopped in Las Vegas.

What happens there? You remember the statement of Mr. Arce? At first Mr. Arce tells us that he met Mr. Sotelo in a casino. Why is he lying? He himself told you why he was lying. He said, "I was scared." He made up a lie. What's Mr. Sotelo saying? Mr. Sotelo is saying, "Oh, we just went down, picked up a truck, took a truck down and now we're bringing a truck back."

Do you realize the significance of what's happening here? Is it clear to you that Mr. Sotelo, as between the two of them, was the leader? Mr. Sotelo was dominating. Mr. Sotelo was the one who made it that Mr. Arce was there by virtue of the debt and taking the car and so forth.

Mr. Sotelo was telling Arce what to do. Mr. Sotelo was the leader. Mr. Sotelo was in the know. Mr. Sotelo was knowledgeable, and what he told law enforcement at that point in time was a partial truth. Was it true that they had taken the car down south to Mexico? Yes. Was it true that they'd brought a truck back? Yes.

But it was only a partial truth. Mr. Arce, not the leader, wasn't thinking quickly enough to come up with that partial truth. He provided a lie. But then later on, very interestingly – whoops. The officers tell us that all a sudden Mr. Arce is telling the same story as Mr. Sotelo, a partial truth. And then Mr. Arce tells us how that came about, because Mr. Sotelo got together with him between the time they were arrested and when they were brought to Idaho and told him what? "Just tell them what I'm telling them. Just tell them what I'm telling them so that we have consistent stories."

And what else did he tell him? "If you get a chance, run because if I get a chance, I'm going to run." And that was the setting as they went to Idaho. You know the rest, as far as

how the truck was brought to Idaho and all of the efforts that were made as far as the sting, the controlled deliver, and you see what was going to happen there.

Let's go back to this and remind ourselves what's happening here. On the 18th at 9:46 they have been arrested. The load isn't there. Had they not been arrested, according to the testimony of Agent Hinton, the load would have been arriving in Idaho about this time. It's not there. It's not arriving. And what do we see on the phone tolls? Mr. Lopez is calling New Acres, and what's being said here? You're entitled to infer what's going to be said here.

What's being said here on this conversation is, "The load's not here. We don't know what's going on. We're starting to be concerned." And then at 5:07, later on in the evening, now that it's really certain that the load has not arrived, we've got Mr. Lopez calling and saying, "We got problems. The load has not arrived."

Then on 11-19, what's happening? This is the day of the sting. This is the day of the controlled delivery. See from the telephone tolls how the members of the conspiracy are concerned the load has not arrived. That prompts these telephone calls, the calls to Chicago and they're out looking. You see the calls at 12:29 p.m. They're calling Chicago at 12:31, 12:32, 12:35. They're trying to figure out what's going on, what's happening here.

And Mr. Lopez, at the top of page 4, is calling Chicago once again as the communication is hot and heavy. Why. Because the load hasn't shown up. And then at 7:27 we don't see a lot of communication between 1:20 and 7:27. There's nothing. And at 7:27 the UC call is made and that generates a whole slew of calls involving Mr. Lopez, involving the pagers and all kinds of locations. Pay particular heed to those locations. What's happening here? Mr. Lopez and Mr. Jiminez –

THE COURT: Just a moment. We're having a technical problem. All right. Proceed.

MR. LINDQUIST: The UC call generates a great deal of activity because in the UC call they're told the truck has now been left at the Karcher Mall. Reflect on the locations of these calls from pay phones. Mr. Jiminez – or excuse me – Mr. Lopez, his calling card call is being made at the Circle K and at various places right around the Karcher Mall.

What's going on here? What's happening here is not that they're looking for the truck. They know where the truck is. What's happening here is that they know that the truck is a day late, and they know that that might suggest not only difficulties, but the fact that perhaps law enforcement is involved. Perhaps it had been discovered.

What's going on here is surveillance. You've got these individuals, in effect, on both ends of the Karcher Mall as far as the main highway there watching. That's why, when they get that pager number, when they get

APPENDIX B

Government's Motion to Reconsider Grant of New Trial, filed August 7, 1998, Tr. Pp. 1-8

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Criminal No. 97-103-S-BLW

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA

vs.

MANUEL SOTELO, RAMIRO ARCE, FRANCISCO JIMINEZ, ADRIAN LOPEZ,

Defendants.

GOVERNMENT'S MOTION TO RECONSIDER GRANT OF NEW TRIAL

The United States of America and Betty H. Richardson, United States Attorney for the District of Idaho, through Kim R. Lindquist, Assistant United States Attorney, ask the Court to reconsider its decision of July 27, 1998, wherein it granted a new trial for Defendant Jiminez as to Count One, and Defendant Lopez as to both Counts One and Two. This request is based upon the following reasoning:

The United States does not dispute the basic and general conspiracy law upon which the Court has made its decision, namely, that a conspiracy is deemed to continue "until there is affirmative evidence of abandonment,

withdrawal, disavowal or defeat of the object of the conspiracy." United States v. Castro, 972 F.2d 1107, 1112 (9th Cir. 1992). However, the United States does take exception to the specific application of the case of United States v. Cruz, 127 F.3d 791 (9th Cir. 1997). That case is simply not applicable, but has been directly relied upon by the Court in focusing on the defeat of the object of the conspiracy as the pivotal issue in deciding these post-conviction motions. At the same time, the United States agrees with the essential formulation of the primary issue, namely, whether "a rational trier of fact [could] find that Lopez and Jiminez were members of the conspiracy prior to the seizure of the drugs in Nevada at 1:18 a.m. on November 18." (Memorandum Decision and Order, page 4.)

The anatomy of the Cniz case can be stated in three component parts. First, that conspiracy was limited by the indictment and the evidence to five named individuals. Second and similarly, that conspiracy was limited by the indictment and the evidence to the single load of narcotics transported from California to Guam. Third, the Defendant Cruz was indisputably not involved prior the seizure of the drugs, but was recruited afterwards. Those post-seizure activities, though perhaps constituting a conspiracy, would necessarily have constituted a new conspiracy not charged in the indictment, all by virtue of the defeat of the limited object of the conspiracy with the seizure of the narcotics.

The composition of the case at bar is distinct.

First, the conspiracy charged in the Superseding Indictment is much broader and not limited to the four named Defendants. Indeed, that document refers to others "both known and unknown," but similarly involved in the conspiracy. Moreover, the evidence presented at trial substantiated the same. Beyond the four named Defendants and over the course of the travel from Idaho to Arizona and Mexico and back to Idaho through Phoenix, other conspirators were clearly revealed: the wife of Defendant Sotelo; Ramon Perez; Roberto Ibarra; the individual known as

"Compadre"; and others. Additionally, at the time of the "sting" in Idaho, the three initiating telephone calls revealed the voices of three distinct individuals, all clearly involved in the conspiracy. And finally, the toll records introduced into evidence showed additional contacts in the Chicago and Idaho/Oregon areas. Indeed, the evidence showed that Defendant Lopez, after retrieving the narcotics, called another individual or individuals at New Acres, Idaho, thereby further confirming the multiplicity of conspirators beyond the four named in the Superseding Indictment.

Similarly, the Superseding Indictment was not limited in its language to the load of marijuana and cocaine seized on November 18. Although clearly including the seized load, that charging document refers to a conspiracy that had been ongoing from a date uncertain up to and including November 18, 1997, the general object of which was to possess with intent to distribute and/or distribute cocaine and/or marijuana, as reflected, but not limited, by the November 18 load.

This, too, was supported amply in the evidence presented at trial; that is, that the conspiracy charged and proved, with regard to its object, predated and was much broader than the November 18 load in its structure, organization and implementation. To be sure, the evidence at trial focused on the November 18 load, but always within the context of the ongoing conspiracy with its overall drug distribution objective.

Beginning with Defendant Arce's recruitment, that pre-existing and ongoing conspiracy was demonstrated. The methodology associated therewith was confirmed by the way the vehicles were initially moved from Idaho to the Phoenix area, involving a number of co-conspirators beyond the named Defendants. The organization reflected by the communications scheme, involving cellular telephones and beepers, confirmed that broad, pre-existing structure. The way meetings took place in Phoenix on the way south, including the discussion of firearms, demonstrated a well-

entrenched organization much broader than the November 18 load alone. The fact that, upon meeting co-conspirators in the Phoenix area, Defendant Sotelo drove vehicles there and otherwise knew where the co-conspirators lived and where he was going showed vividly that this was not the first time that narcotics had been moved by the organization. Indeed, Defendant Arce testified that at one point Sotelo discussed with a co-conspirator by telephone the very parking lot in the Phoenix area where they were to meet and where they had met before. The cellular telephone dialog prior to picking up the flatbed truck in the Phoenix area showed a pattern and methodology established far beyond the events of November 18. Indeed, the very nature of the flatbed truck, with its hidden compartments and the boards and screws worn by numerous removals, confirm that pre-existing breadth and structure. The registration of the flatbed truck and the vehicle used to pick up their narcotics by Defendants Jiminez and Lopez showed clearly a pre-existing structure and methodology in the transportation of narcotics. Moreover, the fact that Jiminez, at the time of his arrest, was carrying non-owner car insurance further corroborated the pre-existing and well-thought-out structure of the overall narcotics trafficking scheme. The way Defendants Jiminez and Lopez behaved in surveilling the truck before picking it up demonstrated the same, as well as the route and manner they employed in leaving the area once the truck was obtained. Moreover, the communications by telephone before and after the pickup, involving all of the named Defendants and others and as substantiated by the toll records, provided powerful proof of the nature and breadth of the overall conspiracy charged. The instantaneous communication from cooperating Defendant Arce, through co-conspirators in Phoenix and ultimately to Defendants Jiminez and Lopez, confirmed again the nature of the conspiracy, together with the identical calling cards possessed by Jiminez and Lopez and the fact that they were calling co-conspirators in Phoenix long before the seizure of the narcotics took place in Nevada. Finally, the fact that no purchase money was carried by or seen with Sotelo throughout the course of the entire trip indicates a sophisticated, pre-arranged methodology of which

the November 18 load was merely one event.

In short, though the November 18 load served as an evidentiary springboard at trial, the Superseding Indictment and the trial evidence proved a conspiracy broader than and whose overall object exceeded that single load.

Thirdly, and unlike Cruz, the evidence was substantial that Defendants Jiminez and Lopez were involved in the conspiracy prior to the November 18 seizure in Nevada. The Court acknowledges this in finding, as a matter of law, that the evidence was "sufficient to support a jury's finding, beyond a reasonable doubt, that Jiminez and Lopez were members of the conspiracy, and that their membership in the conspiracy predated the seizure of drugs." (Memorandum Decision and Order, page 5.) Thus, there is no need to consider whether or not Jiminez and Lopez were members of a new conspiracy subsequent to the seizure of the drugs. Unlike Cruz, they were clearly members prior to that seizure.

It follows from the foregoing that, given the broad, ongoing nature of the conspiracy, the overall object of that conspiracy was not defeated and did not end with the seizure of the November 18 load. Thus, even if Defendants Jiminez and Lopez had joined the conspiracy after that seizure, they would still have been joining the same ongoing conspiracy with its general object intact. This legal and evidentiary reality, coupled with the proof of prior involvement by Jiminez and Lopez, obviates the need for any preseizure instruction to the jury.

Thus, the case at bar is much more akin to the Mason case cited in Cruz, wherein there was clearly evidence of conspiratorial involvement prior to the seizure of particular narcotics. (Reference is also made here to the initial response by the United States to the Defendants' Motions.)

In any event, the Court in its Memorandum Decision and Order, at page 4, properly states the issue as to whether or not "there was sufficient evidence introduced at trial for a

rational trier of fact to find that Lopez and Jiminez were members of the conspiracy prior to the seizure of the drugs in Nevada at 1:18 a.m. on November 18." The Court answers that inquiry in the affirmative by declaring at page 5 that, "construed in a light most favorable to the Government, [the evidence] is sufficient to support a jury's finding, beyond a reasonable doubt, that Jiminez and Lopez were members of the conspiracy, and that their membership in the conspiracy predated the seizure of drugs."

It is then respectfully suggested that the Court errs in speculating beyond this finding that the jury might have found that

APPENDIX C

Jury Instruction Nos. 23/24 – January 15, 1999

Instruction 23

You must decide whether the conspiracy charged in the superseding indictment existed, and, if it did, who at least some of its members were. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you may find that some other conspiracy existed. Similarly, if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

Instruction 24

A defendant may only be found guilty of the conspiracy charged in the indictment if he joined the conspiracy at a time when it was possible to achieve the objective of that conspiracy.

Therefore, if you find that a conspiracy existed, the sole object of which was the possession with intent to deliver and/or delivery of the controlled substances seized by authorities in Las Vegas, Nevada, on November 18, 1997, a defendant may be found guilty of that conspiracy if you find beyond a reasonable doubt that that defendant joined or became a member of the conspiracy prior to 1:18 a.m. on November 18, 1997.

On the other hand, if you find that a conspiracy existed, the object of which was possession with intent to deliver and/or delivery of controlled substances beyond those seized by authorities in Las Vegas, Nevada, on November 18, 1997, a defendant may be found guilty of that conspiracy if you find beyond a reasonable doubt that that defendant understood the scope of the conspiracy and embraced its object beyond the possession and/or delivery of the controlled substances seized by authorities on November 18, 1997.

APPENDIX D

Jury Instruction Conference - January 15, 1999
Tr. pp. 741 - 742

PROCEEDINGS

JANUARY 15, 1999

THE COURT: For the record, we'll now reconvene the formal jury instruction conference in United States versus Jimenez and Lopez. Before I ask Counsel to state their objections to the Court's proposed charge to the jury, I will indicate that yesterday the Court provided Counsel with a set of proposed jury instructions, numbered 1 through 27. We then conducted an informal off-the-record conference to discuss the concerns that Counsel may have had with the Court's proposed charge. At that time certain concerns were expressed concerning proposed instruction 24, which is the Court's attempt to instruct the jury on the legal principles embodied in the decisions of United States versus Cruz, 127 F.3d, 791 and United States versus Umagat, 998 F.2d, 770.

Based upon the concerns of Counsel, the Court made revisions and revised Instruction 24 to Counsel this morning and heard one further objection from Government in which the Court considered and made a slight modification to the instruction. The Court has now provided Counsel with a final set of instructions, numbered 1 through 127. Now there are, in addition, about 6 other instructions which the Court will read after Counsel completes their closing arguments and immediately before the jury begins their deliberations. Those are stock Ninth Circuit Instructions concerning how to deliberate, reminding the jury of a need for a unanimous verdict and things of that sort. I will ask Mr. Fica to provide you with a copy if you want to see those, but they are completely stock Ninth Circuit instructions.

Counsel, now is your opportunity to state for the record any objections you may have to the Court's proposed charge. I would indicate to you that if there's any concern that you expressed yesterday during our informal session that you want made part of the record, you'll need to restate that concern at this time because those proceedings were informal and off the record. Mr. Lindquist?

MR. LINDQUIST: Thank you, Your Honor. The only concern that I would express is what I mentioned this morning. Instruction No. 24, the very last clause of Instruction 24 after the comma following 199', recognizing the Court's having adjusted that, I still feel thatthat clause is superfluous, otherwise adequately covered by Instructions 21 and 22. Otherwise, I have no objections.

THE COURT: All right. Mr. Shurtliff?

MR. SHURTLIFF: No objection, Your Honor.

THE COURT: Mr. Sullivan?

APPENDIX E

Closing Argument of Kim Lindquist –
January 15,1999
Tr. pp. 760 – 767; 780 - 784

jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date, and sign the verdict form which sets forth the verdict upon which you agree. You will then return with your verdict to the courtroom.

We'll now hear the closing arguments of Counsel after which I will give you a few brief closing instructions. Mr. Lindquist?

MR. LINDQUIST: Your Honor, thank you. Ladies and gentlemen, first just a couple of comments before I address the evidence that you have received during the course of this week. First of all, thank you for being here. i don't say that to patronize you.. I hope one of the things that you have seen throughout this week is the marvelous blend of the law and lawyers and folks from the community in trying to arrive at the truth, perhaps cumbersome at times, perhaps a bit bewildering at times. But, nonetheless, I hope you have at least an impression of the magnitude of our system in trying to blend lawyers with folks that aren't lawyers in finding the truth. Your role is so important. If you weren't here, that system simply couldn't work. And it shouldn't work without you because of that.

Secondly, my comments as to the evidence that you have received is not meant to patronize you either. I fully acknowledge that each one of you is just as right as I, just as capable of understanding and appreciating the evidence that has come from that witness stand. And I recognize that, collectively, you're 14 times more able than I to do that very thing.

My purpose is to simply underscore, reiterate, give you the perspective of the United States as far as the evidence is concerned. If you find that helpful, it's yours. If you find it unhelpful, disregard it because those determinations are yours.

What I would like to do first is to perhaps comment just briefly on the law as Judge Winmill has just given it to you. I preface that by saying that the instructions that he has read to you, that you have in your hands, prevail. Those are the instructions that you must follow. I'm always trying to simplify for my own purposes. I'm always trying to reduce things to the most common denominator so that I might better instruct you as to my impressions, the perception of the United States as far as the evidence is concerned. So what I would like to do is just show you – and if I might turn on the machinery, Your Honor.

THE COURT: You may.

MR. LINDQUIST: Again, this is my hen scratching, but perhaps it can be of help to you. It's going to be of help to me as I discuss the facts with you. We are talking about conspiracy, and the essence of what Judge Winmill has just read you is that you must make five inquiries. There are five essential questions that must be asked and determined beyond a reasonable doubt in your deliberations.

What's the first inquiry? The first inquiry is, Do we have a drug conspiracy? And a conspiracy is simply defined as a group of people involved together in distributing drugs. That's the first determination that you have to make: Does the evidence show a drug conspiracy as that's defined? Does the evidence show a group of people joined together distributing drugs? That's the first inquiry.

What's the second inquiry? What is the reach of the scope of that conspiracy? Now, why do we have to ask that secondly? In some conspiracy trials, that's not the case, but in this one it is. Why? It's because on November 18 at 1:18 in the morning, the narcotics, the load coming up from Nevada, was seized by the authorities there. If the scope of the conspiracy was just that one load, then the conspiracy ended as of November 18 at 1:18 in the morning. If the conspiracy, the scope, the reach of that conspiracy, is just that one load, then it ended there. And that determination will, in turn, determine

your inquiry thereafter. If it ended there, then the conspirators, as Judge Winmill has just instructed you, had to have been involved before it was seized as to that one load. If they joined afterwards, they can't be part of that conspiracy. Why? Because the conspiracy ended when the load was seized if the conspiracy was limited to that one load.

But what if that, what if the conspiracy wasn't just limited to that one load? What if the conspiracy was broader than the one load, included loads before the load that came up on November 18, and anticipated other loads afterwards? If that's the nature of the conspiracy, if that's the reach of the conspiracy, then it doesn't matter that the load was seized on November 18 at 1:18 in the morning as far as who joined when. If the conspiracy was bigger and encompassed more than just that one load, then the conspirators could have joined before that load was seized or after that load was seized.

So as far as determining when and if the conspirators joined, you're going to have to decide what was the reach of the conspiracy. Was it limited to just the one load? Or did it encompass more than the one load, loads before that one, anticipating, perhaps, loads after that one? That is the second determination.

Once that second determination is made, the same inquiries continue. The third inquiry – and by the way, the inquiries are the same on both sides of the chart, whether as to conspiracy A, which is limited to the load, or conspiracy B, if you will, which is greater than the load. The third inquiry you have to ask is, Did the defendant become involved? As far as the single load, if you find that the conspiracy was just the single load, you have to ask, Did this particular defendant become involved in that single load conspiracy? And as part of that determination, When did he become involved? And in order to be guilty, when does he have to have joined that conspiracy? Before the narcotics were seized on November 18 at 1:18 in the morning because after that, a single load conspiracy no longer existed. It had been defeated by the

Government, by the officers in Las Vegas seizing the narcotics.

So if your determination on number 2 is that the conspiracy we have here was limited to the single load, you have to determine, Was the defendant involved? And if he was involved, when did he become involved? And it must have been before that load was seized.

On the other hand, if you determine that the conspiracy was broader, encompassed more than just that one load, you also have to determine if the defendant became involved, but it doesn't matter when he became involved. It could have been before the narcotics were seized in the one load or after because the conspiracy encompassed far more than just the one load.

What's the fourth determination that you have to make? Did the defendant know, or reasonably should have known, of the reach of the conspiracy? In the left-hand column, if the conspiracy was limited to a single load and you find that the defendant was involved in that load and that the defendant became involved before it was seized in Nevada, you have to determine, Is there proof beyond a reasonable doubt that that defendant knew or had reason to know of the load?

If the defendant did know of the load, if the defendant had no knowledge or reasonably shouldn't have known, was just an innocent spectator, an innocent bypasser, if you will, he can't be guilty. But if the facts show beyond a reasonable doubt that the defendant was indeed involved, joined the conspiracy as to the one load before that load was seized and knew or reasonably should have known of that load what was happening there, then four-fifths of the inquiry cry out for guilt.

If, on the other hand, you have determined that the conspiracy is broader than the one single load, the inquiry is exactly the same, but it's geared toward the scope of that

broader conspiracy. Did the conspiracy encompass more than just that one load? Was it bigger than just the one load? If so, did the defendant become involved? And it doesn't matter when the defendant became involved if you find that the defendant became involved. But at the same time, the evidence must show that that defendant knew or reasonably should have known of the reach of the conspiracy beyond just one load. If the evidence shows that, then that determination is for guilt.

And what is, finally, the fifth inquiry? Did the defendant intend to help? Whether the conspiracy you find is limited to a single load or encompassed more than that one load, in addition, it must be found that the defendant intended to help.

So, in summary, assuming that you find that this conspiracy simply encompassed the one load, in order for each defendant to be found guilty, what must be proved beyond a reasonable doubt? That there was a drug conspiracy; number 2, it was limited to just the one load that was seized; the defendant joined that conspiracy, became involved in the conspiracy; the defendant joined or became involved before the narcotics were seized; the defendant knew that it was a load of narcotics as part of his involvement; and the defendant intended to help. If the evidence shows beyond a reasonable doubt that that's the case, the defendant is guilty. If one of those elements is missing, you must acquit. That's the burden that's placed on the United States, one that we willingly accept.

Now, what's the alternative theory? Is there a drug conspiracy? Yes. What is the reach of that conspiracy? Did that conspiracy involve just more than this one load, loads before this, anticipating loads after? If that's what you find, the next inquiry, Did the defendant become involved in that? It doesn't matter when he joined, so long as you find that he became involved. Did he know or have reason to know that this conspiracy involved more than just this one load? And, secondly, Did he intend to help? Those are the two

alternative tracks that you can take legally as far as this evidence is concerned.

Then I just put down here, as long as the foregoing, as long as either one of those two tracks is proved beyond a reasonable doubt, that involvement may be relatively minor or for a relatively short period of time. As long as you find that there was a conspiracy, the reach of that conspiracy, that the defendant became involved in that conspiracy, that the defendant knew or had reason to know of the reach of that conspiracy, and that the defendant intended to help, with those factors proved beyond a reasonable doubt, the participation can be 11/15, or the next page, goes from 11/15 to 11/16. What's happening? The whole top of this page, you see what is happening. As they travel south to Arizona, Sotelo is talking to the Arizona contacts. And you can just follow the cellular regional reflections here as they travel south to Phoenix. . They're going down with the empty white bed truck. They are going to be dropping it off. And isn't it interesting that as they are going down, not only is Sotelo talking to the contacts in Arizona, but Sotelo is in touch with the cellular phone connected with Elizabeth Rayo. Who's that? It's Mr. Lopez. It's Mr. Lopez here, here, and here. Is it coincidental that he's talking to Mr. Lopez? No, because Mr. Lopez knows that they are going to go down; they are going to be bringing the load back, and he's going to play his integral role up here once it comes back.

Now, I put an asterisk by Mr. Lopez's name over there, and I will tell you why. How do we know for sure that this is Mr. Lopez? Take a look at this phone call right here. Here's Mr. Lopez using the 273 card at this number. That's the number, that's the residence number listed to Elizabeth Rayo at her house. And so here we have Lopez at the house of Elizabeth Rayo. Here we have Lopez at the house of who? Mireya Alvarez, because remember, Elizabeth Rayo left her cellular telephone with Mireya. There is Mireya at that house and Lopez is using his card there. So on the 16th, Lopez is using his card there at the house of Mireya Alvarez. Mireya says that he was there using the cellular telephone. Well, here

he is using her phone there, and the day before, he was using the cellular telephone. It's Mr. Lopez, and you can conjecture until you're blue in the face that it wasn't Mr. Lopez. It was Mr. Lopez. What's happening at this point in time, or what people do we have involved? Sotelo, Ybarra, Perez, Lopez, Valladarez, essentially the same people that make up the conspiracy.

Next page, and I'm moving quickly because I only have so much time. This page embarks November 16 through, well, through November 17. What's happening here? Now Sotelo and Arce are going south to the border. Sotelo keeps talking to Arizona to fine tune the loading of the white bed, the flatbed truck that has been left there. At 3:30, according to Arce, they get to the border, and they spend the night there in Nogales. They start back the following day from Hermosillo. After having left the truck in Hermosillo, they go back by taxi and bus to the border, and you can: look at the tickets in evidence at 8:45 in the morning. So at 8:45 in the morning of the 17th, Sotelo and Arce are headed back, headed back to Phoenix to pick up the truck that will have been loaded with drugs to take back to Idaho. And, once again, isn't it interesting that at the very moment that Sotelo and Arce are headed back to Phoenix to pick up the truck that now will be loaded with drugs, what the phone tolls show as far as activity, Mr. Lopez using his 595 card to talk to Roberto Valladarez in Chicago and where is he calling from? The Indian Creek Mobile Home Estates. And if you remember, Ms. Alvarez said that she moved out of that when she moved over to the Elizabeth Rayo residence, and when she moved out, who moved in? Mr. Lopez moved in. So who's using the phone card at that residence? Mr. Lopez. And, coincidentally, right at the time that the white flatbed truck is going to be picked up in Arizona to bring the dope back.

The next entry, Lopez once again, who is he talking to? Nu Acres. That's where the dope was going to be headed. And who else enters the picture once again or reveals himself once again? Mr. Jimenez using his 130 call talking to whom? Nu Acres, the place that the drugs were going to go. Why are

Lopez and Jimenez talking to these people now? Because they are the ones that are going to be receiving this when it comes up wherever it was supposed to be delivered and do something with it, distribute it, deal with it, and they are staying in the loop. They are checking in. The rest of the calls show Sotelo and Arce going to Phoenix and picking up the white flatbed truck. All of these calls show that happening as they go north to Phoenix to pick up the truck.

It continues over on November 17 with Sotelo and Arce picking up the truck. And we know, according to Mr. Arce's testimony, that in the evening of November 17, they left Phoenix, they picked up the flatbed truck, left there in the parking lot with the keys in the ashtray, now full of dope, and they are headed north to Idaho, but through Las Vegas. And what happens on the 18th at 1:18 in the morning? They are stopped in Las Vegas by the officers and the narcotics are seized, and the sting aspect of the operation begins.

Now, let's just stop right there. Given the instructions that the Judge has given you, if this conspiracy only had to do with the one load, if this conspiracy only had to do with this one load, and nothing more, the pertinent question here, Did these two gentlemen, were they involved before that dope was seized there in Las Vegas at 1:18 in the morning on the 18th? And the answer from the phone tolls alone is, yes, yes, they were part of the group. They were part of the Idaho connection in conjunction with Arizona and Chicago, and there were communications among them. But I think you can also see that the conspiracy wasn't limited to just this one load. It was pre—existing, but nonetheless, they were still part of it. They were still part of it, and that they had become involved.

Interestingly enough as we have seen previously, now we know that the flatbed truck is headed to Idaho full of dope. And what does the phone traffic start to reflect? Bingo, there's Mr. Lopez talking to Nu Acres where the dope is supposed to be taken. Is that just coincidental, just happened to be talking to a sweetheart at that time? No, it is part of the

drug transaction. He's part of the Idaho connection to receive it.

Now, I made a little notation here that says at approximately 12:00 the load was expected. That's according to Agent Hinton's testimony. It takes about 12 hours to get from Las Vegas to Idaho,. so it should have been expected at about 12:00. At this particular call, he's anticipating that it should be arriving, but by 5:07 when he is talking to Valladarez in Chicago, it's late. It's late, and the traffic reflects that it causes a worry because what do we have now? On the following day, we have got Lopez trying to contact Chicago. What's going on here? Something is wrong, something is wrong, the dope is not here; it's late; something happened, what's going on?

APPENDIX F

Appellate Brief of the United States of America
in the Ninth Circuit
Tr. pp.17 - 19

USCA No. 99-30145

USDC (Idaho) No. 97-103-S-BLW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

-vs-

ADRIAN LOPEZ-MEZA,
Defendant/Appellant.

BRIEF OF APPELLEE

On Appeal from the United States District Court
for the District of Idaho
Honorable B. Lynn Winmill District Court Judge

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Exhibit 64, p.5.) The evidence also established that Jose Meza paid for the phones and the rent where Lopez lived. (GER, second trial, pp.440-451.)

A DEA agent testified to the general characteristics of a large drug organization as they related to the specific facts of this case, and provided the opinion that the

organization reflected by the case at bar was such and would necessarily have involved other transactions and loads besides that seized in Nevada. (GER, second trial, pp.617-648.)

III

ARGUMENT

Restatement of Issues

A. Did the District Court Err by Refusing to Grant Appellant's Motion for Judgment of Acquittal after the First Trial?

Appellant relies on the case of United States v. Cruz, 127 F.3d 791 (9th Cir. 1997), for the proposition that once the drugs were seized in Nevada the conspiracy ended, assuming the conspiracy was limited to that single load. Given such, the Cruz case establishes two factual possibilities as far as the evidence is concerned: (1) that the conspiracy was limited to the load seized and ended when the narcotics were seized in Nevada on November 18, 1997, with Appellant and co-defendant Jimenez having joined the conspiracy before said seizure; or (2) that the conspiracy embraced more than the one load, allowing Appellant and co-defendant Jimenez to have joined either before or after said seizure.

The evidence at the first trial clearly supported a finding that Appellant was part of the conspiracy, whether he joined before or after the seizure of the load in Nevada. In the first instance, the evidence clearly supported a finding that, if the conspiracy consisted of many participants beyond the defendant's charged but only the narcotics seized in Nevada, Appellant joined the conspiracy prior to the seizure. At the same time, the same evidence supported a finding that the conspiracy consisted of more participants than the defendants charged and more narcotics predating the seizure of those seized in Nevada, thereby accommodating Appellant's joinder at any time before or after said seizure. A

restatement of the facts is unnecessary to eiterate the evidence and reasonable inference therefrom that, even if the conspiracy were limited to the load as seized, Appellant was involved well before that seizure. Indeed, his post-seizure behavior not only corroborated his pre-seizure activity reasonably inferred from the telephone traffic, but, in and of itself, suggested prior involvement. Moreover, those same facts show a pre-existing conspiracy that involved much more than the single load as evidenced by the quantity of narcotics involved, the organization, communication patterns and structured activities. Taking the evidence in a light most favorable to the Government, the Trial Court was on firm ground in finding, in essence, that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt under either of the Cruz scenarios.

However, the Court reasoned that it was possible that the jury only believed and found that Appellant and co-defendant Jimenez joined the conspiracy after the seizure of the single load of narcotics in Nevada, without the Court having instructed them as to the Cruz ruling Hence, the Court ordered the new trial. Nonetheless, the evidence was still sufficient for a rational trier of fact to find guilt as to the conspiracy beyond a reasonable doubt under either of the Cruz possibilities.

In this regard, Appellant's argument (Appellant's Brief, pp.15-19) constitutes, in essence, closing argument or the defense interpretation of the evidence. The arguments fail to preclude the reasonable inference taken by the Trial Court and the firm basis provided by that reasoning in denying the judgment of acquittal. Moreover, the case of United States v. Galvan, 693 F.2d 417 (5th Cir. 1982), is not controlling legally and is factually distinguishable. The Galvan decision is limited to evidence of telephone calls. The case at bar not only involve telephone activity but specific and observed behavior which more than amply substantiated the participation in the conspiracy that went far beyond mere association.

Opposition Brief not available For Filming at this time